

## Ask the Probate Judge—Adoption Inheritance Rights

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**Q: My ex-husband and I had a son. We divorced, and I remarried. My new husband adopted our son, who is now 28. My ex-husband remarried and had two more children. He died recently without a will. An attorney told me that my son's right to inherit from his natural dad ended when he was adopted by my new husband. Do you agree? I.R.H., Albuquerque**

Your interesting question arises at the probate court periodically. Given the facts you listed and a new version of the law that affects this issue, I agree with the attorney.

The general rule in New Mexico is, "An adopted individual is the child of his adopting parent or parents and not of his natural parents...." Most state laws treat adopted children as blood relatives of their adopting parents and as strangers to their natural parents.

### Prior New Mexico Law

Prior to May 19, 2004, our law contained an exception to this general rule. Section 45-2-114(B)(2) read in part, "... adoption of a child by the spouse of either natural parent has no effect on: ... the right of the child or a descendant of the child to inherit from or through *the other natural parent*."

This meant that a child adopted by the new spouse of the child's natural parent could also still inherit from both natural parents. This rule applied in intestate estates, where the decedent had no valid will.

If all of the parents involved in your scenario died without a valid will, under prior New Mexico law, your son could conceivably have inherited from you, his stepfather, and his natural father.

### Current New Mexico Law

In 2004 the New Mexico legislature amended this provision of the law. The law changed the four words "the other natural parent" to "that nonsevered natural parent." I searched for a definition of "nonsevered natural parent," but it appears we are the only state in the nation to use this term.

I then studied the Fiscal Impact Report prepared by the Legislative Finance Committee when this law was still a bill. The report confirmed that the law intends to amend intestate laws for adopted children. The report states, "[This law] amends the adopted child's intestate rights relating to the other, severed natural parent who was replaced by the adopting spouse. The bill limits intestate rights to the child and the nonsevered natural parent. The [law] eliminates intestate rights between the child and the severed natural parent."

The report posited that the severed natural parent (the one who gave up his/her legal rights to the original child) may have another family, who also has inheritance rights. Once a child is adopted by a stepparent, it would be unreasonable to allow the child to inherit from three sources: 1) the nonsevered natural parent, 2) the adopting stepparent, and, 3) the severed natural parent.

The legislature agreed, and the Governor signed the bill into law.

### Don't Like the Law? Make a Will

Despite this amended law, natural parents may *want* to include a child who was adopted by stepparents or others as a beneficiary of their estate. Even though they have no legal obligation to do so, they could create a will that stated their wishes to include that child.

If your ex-husband had signed a will that said he had a son who was adopted by others and that he (your ex-husband) wanted to include the son as a beneficiary of his will, then your son could have inherited from his natural father. But your ex-husband did not do so.

Bottom line: given the intestate situation you described, under current New Mexico law, your son can no longer inherit from his natural father. If estate planners disagree with me, please let me know.